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Supreme Court of the United States

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

PETITION OF APPELLANT, HUDSON & MANHATTAN RAILROAD COMPANY, FOR REHEARING OF MOTION TO DISMISS, AND OF ORDER DISMISSING ITS APPEAL

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Supreme Court of the United States

HUDSON & MANHATTAN RAILROAD COMPANY, *Appellant,* *vs.* CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellees.*	October Term, 1943 No. 766

PETITION OF APPELLANT, HUDSON & MANHATTAN RAILROAD COMPANY, FOR REHEARING OF MOTION TO DISMISS, AND OF ORDER DISMISSING ITS APPEAL

Hudson & Manhattan Railroad Company, appellant in the above proceedings, respectfully petitions for rehearing of the motion to dismiss its appeal herein, and of the order of this Court of April 3, 1944 granting said motion and dismissing such appeal. The grounds of this petition are as follows:

I. Neither *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587, 588-9, nor *Sterling* v. *Constantin,* 287 U. S. 378, 386, cited by this Court in its *per curiam* opinion of April 3, 1944, dismissing the appeal herein, would seem to afford any authority whatever for such dismissal.

II. Neither the cited cases, nor the previous decisions of this Court upon which they are founded,* hold, as would

**Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 224; *Pacific Telephone & Telegraph Company* v. *Kuykendall,* 265 U. S. 196, 205; *Shaffer* v. *Carter,* 252 U. S. 37, 44.

be necessary to warrant the dismissal of this appeal, that where, as here, an appellant carrier has been subjected to heavy damages by the granting by a statutory court of an improvident interlocutory injunction against orders of the Interstate Commerce Commission according such appellant increased fares, the appeal *as of right* from the granting of such interlocutory injunction which such appellant has taken under Section 47, Title 28, U. S. C. A., is extinguished by merger in a subsequent appeal which such appellant has been compelled to take, *also as of right,* under the same section and Section 47a, from an equally improvident final injunction, whereby the injury to the appellant has been perpetuated and such damages tremendously increased.

III. Such a holding, it would seem, would contravene not only ordinary canons of statutory construction but ordinary common sense.

Such a holding would construe the appeal from an interlocutory injunction granted, *as of right,* by Section 47, as extinguished *ipso facto* by an appeal from a final injunction granted, also *as of right,* by that section and Section 47a, without the slightest warrant for such a construction either in the language of those sections, or in any considerations of necessity.*

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*Obviously, had Congress intended any such *automatic* extinguishment of one appeal *as of right* by another and separate appeal *as of right,* it would have been simple and natural to have expressly so stated. It will subsequently be shown that there are certain cases where the appeal as of right from an interlocutory injunction is extinguished *by necessity* in an appeal as of right from a final injunction.

Such a holding would largely nullify the express provisions of Rule 65(c) of the Federal Rules of Procedure, which accords a defendant the absolute right to be secured against the damages which such defendant would incur by reason of a wrongful interlocutory injunction.

Such a holding would result, moreover, in the paradox that a defendant would be so secured only where the statutory court, having granted an improvident interlocutory injunction, should refuse to grant an improvident final injunction, but would be denied such security where, as here, the statutory court compounded the injury by granting both an improvident interlocutory and an improvident final injunction.

Finally, it is obvious that in both cases the preservation of the right to appeal from the granting of an interlocutory injunction is necessary to secure the determination by this Court as to whether such interlocutory injunction has been wrongfully granted, as a basis for the recovery of damages either under the Rule or in a suit for malicious prosecution.

IV. Such a holding, moreover, would preclude the determination of the novel question presented by this appeal, whether this appellant is deprived of its right to damages under Rule 65(c) because the statutory court here wrongfully refused, in contravention of that rule, to require appellee, Jersey City, to give security to protect appellant against such damages as appellant might suffer should it be found that such interlocutory injunction was wrongfully issued. The decisions of this Court in *Russell* v. *Farley*, 105 U. S. 433, and *Meyers* v. *Block*, 120 U. S. 206, would not seem determinative in this respect, since in those cases the right of the enjoined party to the protec-

tion of a bond against damages for the wrongful issuance of an interloctutory injunction rested in the discretion of the court and was not the absolute right accorded under Rule 65(c). Indeed, *Inland Steel Company* v. *United States,* 306 U. S. 153, 156, 157, and *Public Service Commission* v. *Brashear Freight Lines,* 312 U. S. 621, 628, 629, both decided since Rule 65(c) became effective, while citing the *Russell* and *Meyers* cases *supra,* make it extremely doubtful whether such earlier decisions apply under Rule 65(c).

In the *Public Service Commission* case, quoting the *Inland Steel* case, this Court said, p. 628:

> "It is obvious, and was obvious from the beginning, that the main damages would be suffered by the State of Missouri and not by these petitioners as individuals. It was to protect the state through its officials that the bonds were required. In making this requirement the court acted in harmony with the governing principle *'that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public —whose interests the injunction may affect' Inland Steel Co.* v. *United States,* 306 U. S. 153, 157." (Italics supplied)

Furthermore, in the Public Service Commission case, this Court said, page 629:

> "Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Russell* v. *Farley,* 105 U. S. 433, 444 *et seq.,* 26 L. ed. 1060, 1064; *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273."

It is particularly to be remarked that the case of *Pease v. Rathbun-Jones Engineering Company* cited in the above quotation was not a case involving an interlocutory injunction but involving the right of the District Court to assess damages against sureties on a supersedeas bond upon affirmance of the decree appealed from. The appellant contended that any damages could be recovered only by a suit on the supersedeas bond. In disposing of this contention, this Court said, p. 280:

> "The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation. Applying this principle, equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds. See cases cited in the margin."

Appellant, therefore, submits that, since under Rule 65(c) it was in this case mandatory and not, as in the *Russell* and *Myers* cases, merely discretionary upon the part of the District Court to require a bond before issuing an interlocutory injunction, appellant should not be prejudiced by the District Court's refusal to obey the mandate of that Rule nor should appellee, Jersey City, be put in a better position than if the District Court had obeyed that Rule. On the contrary, it would seem that under the general equitable principle set forth by this Court in the *Inland Steel*, the *Public Service Commission* and the *Pease* cases, *supra*, the District Court should have full authority to award damages although no bond was taken.

V. Even assuming that appellant, in the absence of the giving of security under Rule 65(c), has no right to damages under that Rule, appellant is entitled to the determination by this Court whether the interlocutory injunction was wrongfully issued, as the basis of a suit for damages for malicious prosecution, or its legal equivalent, reckless prosecution.

VI. Irrespective of appellant's right to damages either under Rule 65(c) or for malicious prosecution, it would seem this Court should entertain this appeal in order:

(a) To avoid the implication that an appeal *as of right* under Section 47 from the granting of an interlocutory injunction is *ipso facto* and under all circumstances extinguished by merger by an appeal *as of right* under that section and under Section 47a from the granting of a permanent injunction.

(b) To make clear that a municipality is not exempted from the provisions of Rule 65(c) requiring as a condition precedent to the granting of an interlocutory injunction, that security be given against damages through wrongful issuance of such an injunction.

(c) To make clear that a municipality is not entitled to an interlocutory injunction if it lacks authority to give the security required by Rule 65(c).

(d) To make clear that it is an abuse of discretion for a statutory court to grant an interlocutory injunction in the complete absence of any proof that damage would result to a plaintiff pending final hearing should an interlocutory injunction not issue, and in the face of uncontroverted proof

that heavy and possibly irreparable damage would result to a defendant from the granting of such injunction.

Appellant believes that this Court may possibly have been misled into granting the Price Administrator's motion to dismiss appellant's appeal from the interlocutory injunction by the fact that appellant filed no reply to that motion.* The Court's attention, however, is particularly called to the fact that the Price Administrator's motion to dismiss was not based upon the ground in which the Court apparently based its order of dismissal, that is the alleged merger and extinction of the appeal as of right from the interlocutory injunction in the appeal as of right from the final injunction. On the contrary, the Price Administrator's motion to dismiss was based merely on the assertion that

> "The matter falls within the well established rule that an order of a three-judge court denying or granting an interlocutory injunction will not be dis-

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*It is to be noted that the appellee, Jersey City, neither itself filed a motion to dismiss nor joined in the motion of the Price Administrator. It is further to be noted that, while the Price Administrator is expressly exempted from Rule 65(c) this exemption does not extend to Jersey City. The holding of the statutory court to the contrary is plainly erroneous and has been assigned as error by appellant.

It further seems clear that if the interlocutory injunction here appealed from was wrongfully issued, the fact that under Rule 65(c) appellant was entitled to no security from the United States or from any officer or agency thereof for damages against such wrongful issuance did not deprive appellant of the right to security from Jersey City against such damages even though the interlocutory injunction was issued at the joint suit of Jersey City and the Price Administrator. The exception of the Price Administrator from the requirements of Rule 65(c) is specific and, therefore, is not to be extended by implication.

turbed on appeal unless plainly the result of an improvident exercise of judicial discretion.

United Fuel Gas Co. v. *Public Service Commission*, 278 U. S. 322;
Alabama v. *United States*, 279 U. S. 229;
National Fire Insurance Co. v. *Thompson*, 281 U S. 331."

Since appellant's jurisdictional statement expressly set out, as required by Rule 12(1) of this Court, the respects in which appellant claims that the statutory court had abused its discretion in granting the interlocutory injunction appealed from, appellant believed no reply required to the Price Administrator's motion to dismiss, as such motion would seem at most to have tendered an issue as to whether the statutory court had abused its discretion. This issue, appellant believed, could not properly be determined merely upon the motion to dismiss since it went to the merits of the appeal. In any event, this Court, as has been noted, did not dismiss on any such ground but on the ground of merger.

It may be suggested that appellant should have anticipated that this Court might consider the cases cited in its *per curiam* opinion as constituting authority for the dismissal of this appeal upon the Court's own motion. There are several answers to any such suggestion:

First, appellant believed that the nature of this case, as stated in appellant's jurisdictional statement, clearly precluded the applicability of the cited cases.

Second, both the Price Administrator and Jersey City were apparently of the same opinion since neither made a motion to dismiss based on the cited cases or on any theory

that, under the circumstances of this case, the appeal from the interlocutory injunction was merged and extinguished by the appeal from the permanent injunction.

Third, the cited cases, as appellant will undertake briefly to show, afford in fact no authority for the dismissal of this appeal either on the ground of merger or on any other ground.

I

NEITHER *SMITH* v. *ILLINOIS BELL TELEPHONE COMPANY, SUPRA*, NOR *STERLING* v. *CONSTANTIN, SUPRA*, CITED BY THIS COURT IN ITS *PER CURIAM* OPINION OF APRIL 3, 1944, DISMISSING THE APPEAL HEREIN, WOULD SEEM TO AFFORD ANY AUTHORITY WHATEVER FOR SUCH DISMISSAL.

NEITHER WOULD ANY SUCH AUTHORITY SEEM TO BE AFFORDED BY THE PRIOR DECISIONS OF THIS COURT UPON WHICH THE CITED CASES ARE BASED, *I.E., CHAMPLIN REFINING COMPANY* v. *CORPORATION COMMISSION, SUPRA, PACIFIC TELEPHONE AND TELEGRAPH COMPANY* v. *KUYKENDALL, SUPRA*, AND *SHAFFER* v. *CARTER, SUPRA*.

Appellant here appealed from an interlocutory injunction restraining appellant and the Interstate Commerce Commission from putting into effect increased fares which the Commission had accorded appellant as reasonable maximum fares. Such interlocutory injunction was granted at the suit of appellee, Jersey City, and on the intervening petition of appellee, Price Administrator, in the total ab-

sence of probative evidence that damage would result pending final hearing to either appellee should such interlocutory injunction not be granted, and in the face of uncontradicted evidence that appellant would be damaged approximately $1,000 per day by the issuance of such interlocutory injunction.

In this case, as has been shown, appellant therefore should be entitled as of right, on appeal from the interlocutory injunction, to the determination by this Court whether such interlocutory injunction had wrongfully issued, since such determination is an indispensable condition precedent to the right to recover damages either under Rule 65(c) or in a suit for malicious prosecution. In neither of the cases cited by this Court in dismissing the appeal herein, nor in the previous decisions of this Court on which the cited cases were based, did any such situation exist.

In *Smith* v. *Illinois Bell Telephone Company*, the appellant was the Illinois Public Service Commission against which the District Court, at the suit of the appellee, had issued both temporary and permanent injunctions restraining the appellant from imposing confiscatory rates upon the appellee telephone company. This Court affirmed the permanent injunction and dismissed the appeal from the interlocutory injunction as merged in the appeal from the permanent injunction.

In *Sterling* v. *Constantin*, appellants were the Governor and other officials of the State of Texas against whom the District Court, at the suit of appellee oil producers, had issued temporary and permanent injunctions restraining, as unlawful, interference with the production of oil. Again this Court affirmed the permanent injunction and dismissed the appeal from the temporary injunction as merged in the

appeal from the permanent injunction, citing *Champlin Refining Company* v. *Corporation Commission, supra.*

It is obvious that in neither the *Smith* case nor the *Sterling* case could the respective interlocutory injunctions have been wrongful, nor could the respective appellants have suffered damage by reason of them. That the interlocutory injunctions were not wrongful was conclusively determined by this Court's affirmance of the respective permanent injunctions. That the respective appellants could not have been damaged is self-evident. No damage could have ensued to the appellant in the *Smith* case by being temporarily restrained from imposing confiscatory rates. No damage could have ensued to the appellants in the *Sterling* case by being temporarily restrained from unlawful interference with the production of oil. Therefore, no issue remained to be determined on the appeals from the respective interlocutory injunctions, in view of the determinations reached by this Court as to the permanent injunctions. Whether, therefore, such appeals from the interlocutory injunctions were extinguished by "merger" in the appeals from the permanent injunctions, or, more properly, became moot, is immaterial.* There was neither reason nor necessity for the survival of such appeals.

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*It would seem that this Court in the *Smith* case and the other cited cases, in stating that an appeal from an interlocutory injunction is "merged" in a final decree or in an appeal from such final decree, used an inapt term to express what this Court really meant. It seems clear that in those cases this Court meant that under such circumstances an appeal from an interlocutory injunction is *extinguished* by a final decree or an appeal from a final decree, rather than "merged". Indeed, the general equitable doctrine that an appeal from an interlocutory injunction is "merged" in an appeal from a final injunction (*Worden* v. *Searles*, ~~131~~ 121 U. S. 14, 25, 26) is exactly to the contrary of the doctrine of the *Smith* case *et al.*

Champlin Refining Company v. *Corporation Commission, supra* (cited in the *Sterling* case), *Pacific Telephone & Telegraph Company* v. *Kuykendall, supra,* and *Shaffer* v. *Carter, supra* (both cited in the *Smith* case), were all cases where both interlocutory and permanent injunctions *were denied* by the respective District Courts and the appeals held merged were from such *denials* of interlocutory injunctions. However, in the *Champlin* case and in the *Pacific* case this Court reversed the denial of permanent injunctions, while in the *Shaffer* case this Court affirmed such denial.

In the *Smith* case, this Court, referring to this fact with respect to the *Shaffer* and *Pacific* cases, in its opinion, pages 588-9, said:

> "The appeal in No. 193 is from an order, previously entered, granting an interlocutory injunction. A motion to dismiss that appeal on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted but consideration postponed to the hearing on the merits.

Under the general equitable doctrine of merger not only has this Court held, as in the *Worden* case, that on an appeal from a final injunction the Court will consider the merits of an interlocutory injunction, but it has held that all interlocutory orders, including interlocutory injunctions, are reviewable on appeal from a final injunction without separate appeals from such interlocutory orders. *Spalding* v. *Mason,* 161 U. S. 375, 381; *Central Trust Company of New York* v. *Seasongood,* 130 U. S. 482, 491.

Since Sections 47 and 47(a) specifically provide for separate appeals from interlocutory and final injunctions, it is at least doubtful whether an appeal under either of those sections merely from a final injunction would constitute an appeal from an interlocutory injunction. It would nevertheless be paradoxical under any construction of the doctrine of equitable merger to hold that an appeal from a final injunction under those sections extinguishes *ipso facto* an appeal from an interlocutory injunction.

> The motion is now granted and the appeal in No. 193 dismissed. *Shaffer* v. *Carter*, 252 U. S. 37, 44; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 205. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but *the record discloses no reason which prevents the same principle from being applicable.*" (Italics supplied)

Unfortunately, in the *Smith* case, this Court did not attempt to state the principle to which it referred in the italicized portion of its opinion as determining whether an appeal from an interlocutory injunction is merged and extinguished by an appeal from a permanent injunction. Furthermore, while this Court there plainly recognized that there might be circumstances under which there would be no such merger, it likewise unfortunately did not specify them. In any event, it may be stated that the *Smith* case recognized, at least by implication, that an appeal from an interlocutory injunction is not *ipso facto* merged and extinguished by an appeal from a final injunction.

Appellant believes the principle determining whether such merger and extinguishment does or does not take place is clear. That principle would seem to be that an appeal from an interlocutory injunction is merged and extinguished in an appeal from a final injunction only where the determination of the appeal from the final injunction renders moot the determination of the appeal from the interlocutory injunction.

This principle is consistent with all of the foregoing decisions of this Court in which it has held appeals from interlocutory injunctions merged and extinguished in appeals from final injunctions. *It is inconsistent, however, with the dismissal of the appeal in this case.*

Consistently with that principle, it may be stated categorically:

1. That an appeal from *the denial* of an interlocutory injunction is merged and extinguished *ipso facto* in an appeal from either a denial or a granting of a final injunction, and irrespective of the disposition made by this Court of the appeal relating to a final injunction. (The *Champlin, Pacific* and *Shaffer* cases are within this category).

This is because no damages are recoverable under any circumstances from *the denial* of an interlocutory injunction either under Rule 65(c) or under any other known equitable or legal rule or principle. Therefore, the mere granting or denial of a final injunction, whether or not appealed from, renders an appeal from the denial of an interlocutory injunction moot. In fact, there is no purpose in an appeal from *the denial* of an interlocutory injunction except in the unusual case where such appeal can be determined prior to final hearing. Once final hearing is had, whatever may be the determination reached, a reversal of *the denial* of an interlocutory injunction would be useless.

2. An appeal from *the granting* of an interlocutory injunction is merged and extinguished in an appeal from a permanent injunction *only* where a permanent injunction is *granted* and such granting is affirmed on appeal (the *Smith* and *Sterling* cases are within this category) or where a permanent injunction is denied and such denial is reversed on appeal.

3. An appeal from an interlocutory injunction *is not merged and extinguished* in an appeal from the granting of a final injunction where, *as here,* appellant has shown that if it be determined on appeal that the interlocutory injunc-

tion was wrongfully issued, appellant has incurred damages which may be recoverable either under Rule 65(c) or in a suit for malicious prosecution, and the granting of a final injunction is reversed on appeal. (None of the prior decisions of this Court were within this category).

This is because the determination here of the appeal from the final injunction did not render moot the determination of the appeal from the interlocutory injunction, since this Court's reversal of the final injunction left open the question whether the interlocutory injunction was wrongfully issued. Appellant, it is submitted, is therefore entitled as of right to the determination of this latter question since, as already shown, such determination is an indispensable condition precedent to such further proceedings as may be necessary to enable appellant to recover damages either under Rule 65(c) or for malicious prosecution.

CONCLUSION.

Appellant respectfully submits therefore that this Court should set aside its order of April 3, 1944 dismissing this appeal and thereupon should determine whether the interlocutory injunction here appealed from was wrongfully issued; and, should it be determined that such interlocutory injunction was wrongfully issued, should remit appellant to such rights as it may have to recover damages either under Rule 65(c) or in a suit for malicious prosecution.

Appellant further submits that, irrespective of any question of recovery of damages by appellant, this Court should entertain this appeal *as of right* because, as said by this Court, in granting the *discretionary writ* of certiorari in

Public Service Commission v. *Brashear Freight Lines, supra*, p. 624:

> "* * * We granted certiorari, 311 U. S. 642, primarily because *of the procedural importance of determining the statutory function of a three judge court in dealing with questions such as those here presented.*" (Italics supplied)

Respectfully submitted,

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